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No. 85-2134.

In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

ESTATE OF PATRICIA E. GILMORE,
JOSEPH P. GILMORE, EXECUTOR,
PETITIONER,

v.

JOHN J. BUCKLEY, ET AL.,
RESPONDENTS.

Brief in Opposition to a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

R. ROBERT POPEO,*
THOMAS R. MURTAGH,
PETER A. BIAGETTI,
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.,
One Financial Center,
Boston, Massachusetts 02111.
(617) 542-6000

EDWARD E. KELLY,*
BARRON & STADFELD,
18 Tremont Street,
Boston, Massachusetts 02108.
(617) 723-9800

JAMES F. MEEHAN,*
CYNTHIA J. COHEN,
MEEHAN, BOYLE & COHEN, P.C.,
85 Devonshire Street,
Boston, Massachusetts 02109.
(617) 523-8300

LEE CARL BROMBERG,*
BENJAMIN J. NAITOVE,
BROMBERG, SUNSTEIN & MCGREGOR,
10 West Street,
Boston, Massachusetts 02111.
(617) 426-6464

*Counsel of Record
Dated: July 31, 1986

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.

I. Are the circuit courts in conflict in their applications of the legal principles which this Court set forth in *Martinez* v. *California*, 444 U.S. 277 (1980)?

II. Did the First Circuit Court of Appeals apply the *Martinez* principles to the comprehensive record before it in a manner so inconsistent with precedent to warrant this Court's review and rearticulation of those principles?

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Statement of the Case.

STATEMENT OF FACTS.

Respondents Middlesex County, John L. Danehy, Michael E. McLaughlin, S. Lester Ralph, John J. Buckley and Ralph J. Bens (hereinafter collectively referred to as "the County defendants"), adopt by reference the summary of relevant facts set forth by the First Circuit Court of Appeals, *Petition* at A. 2-8, with the following highlights of particularly important facts.

At the time Bradford Prendergast was deemed eligible for furlough from the Billerica House of Correction, the prison's

furlough program was administered pursuant to a written set of "General Guidelines Governing Furlough". *Petition* at A. 6 & n.5. The "Guidelines" provided specific criteria by which a prisoner "classification" board was to determine furlough eligibility, *id.*, required all Billerica personnel immediately to report any information which might affect the release of a furlough applicant to the furlough supervisor or to the prison superintendent, *id.* at A. 7 & n.6, and mandated that, once such information was reported, ". . . under no circumstances shall the resident be released until the matter is resolved." *Id.*

Prior to his murder of Patricia Gilmore, Prendergast had been deemed eligible for furlough pursuant to the "Guidelines," and twice had been released on furloughs, each time returning to Billerica without incident. *Id.* at A. 6, 7. At no time, however, did any of the County defendants have knowledge of Prendergast's furloughs. *Id.* at A. 7. Neither Bens nor Buckley ever received any information from any source regarding Prendergast's reported dangerousness to Patricia Gilmore. *Id.* When the County Commissioners, sitting as the county parole board, did receive such information, they denied Prendergast's petition for parole and forwarded his parole file, including the full report of dangerousness, to Billerica, where a "crisis intervention worker" mistakenly reported its contents only to one inmate counselor. *Id.* at A. 5, 7. Contrary to the explicit requirements of the "Guidelines," the information regarding Prendergast's reported dangerousness was not relayed to then-Superintendent Bens, or to any other County defendant. *Id.* at A. 7 & n.6.

On December 20, 1979, the second day of his third furlough from Billerica, Prendergast kidnapped and murdered Patricia Gilmore. *Id.* at A. 8. This occurred just two days prior to the date on which Prendergast was to be discharged permanently from the institution after having served his sentence in full. *Id.*

Reasons for Denying the Writ.

INTRODUCTION.

The petition for certiorari should be denied because the guiding principles of *Martinez* v. *California*, 444 U.S. 277 (1980), consistently have been applied by the circuit courts, and no further refinement of those principles is necessary. The *Martinez* court could not have made clearer that: (1) a deprivation of constitutional right by a private actor does not constitute state action absent a showing of special circumstances; and (2) each case in which such deprivation is alleged must be determined with careful sensitivity to its particular factual setting.

Guided by *Martinez*, the circuit courts have applied its reasoning with remarkable consistency to the various records before them. Any variations in result plainly are a function of the factual settings in which the cases arose, and do not reflect any conflict in the interpetation of *Martinez*. Indeed, the circuit courts have been virtually uniform in their application of the guiding principles set forth by this Court. *Infra* at Part I. Moreover, the First Circuit's application of those principles to the facts before it in this case — facts amplified by petitioner in the 1100 page appendix he submitted on appeal — is in harmony with the decisions of the other circuit courts, and is both legally and factually sound. *Infra* at Part II.

I. THERE IS NO CONFLICT IN THE CIRCUIT COURTS' CONSISTENT APPLICATIONS OF GUIDING PRINCIPLES TO DISTINCTIVE FACTS.

The *Martinez* Court found that, "at least under the particular circumstances" of the parole decision before it, "appellant's

decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." 444 U.S. at 285. Since then, the "remoteness" inquiry articulated in *Martinez* has been undertaken by the various circuit courts confronting such cases. While obviously based upon differing facts, the circuit cases have been remarkably consistent in both approach and result. State defendants in virtually all cases have been found either to have had no statutorily imposed duty to the victim, to have had no custody or control over the victim, or to have done nothing to have placed the victim in a position of danger.

Contrary to the position taken by petitioner, those cases clearly demonstrate that there is no conflict in the legal principles applied, and therefore no supportable basis for certiorari.

For example, in the Eleventh Circuit case to which petitioner (*Petition* at 11) and the First Circuit opinion (*id.* at A. 15 & n.15) refer, the Court of Appeals first traced the continuity of application of the *Martinez* rationale through each of the cases cited by petitioner, then held that state youth authorities were not liable under § 1983 for a furloughed prisoner's attack on a known potential victim, despite their knowledge of his psychiatric and criminal history. *Jones* v. *Phyfer*, 761 F.2d 642, 644-646, *reh. denied*, 768 F.2d 1353 (11th Cir. 1985). Citing the factors inferred from *Martinez* and the circuit court cases, the *Jones* panel held that the defendant officials' mere knowledge of the potential victim's identity was not, in view of all the facts in the record, ". . . sufficient to establish the required special relationship that would impose a duty on the state to protect plaintiff or to warn her of [the prisoner's] . . . release." 761 F.2d at 646-647. Petitioner's misplaced reliance on *Jones* therefore runs headlong into the fact that its reasoning — and result — mirror those of the First Circuit in this case.

Similarly, the Third Circuit Court of Appeals most recently applied the reasoning of *Martinez*, and of virtually all of the

circuit court opinions on which petitioner seeks to rely, to facts in which a child abuse victim was beaten to death after a state agency negligently returned her to the home where she previously had been abused. *Estate of Bailey* v. *County of York*, 768 F.2d 503 (3d Cir. 1985). The *Bailey* court reversed dismissal of a § 1983 claim alleged against the state, not because of any conflict or inconsistency in the district court's application of the *Martinez* rationale, but simply on the ground that, "We find it sufficient to hold that in the special circumstances pleaded here, this case falls on the other side of the line suggested in *Martinez*." *Id.* at 511. In *Bailey*, those "special circumstances" included a statutory duty imposed on the defendant child welfare officials to protect the victim, and the fact that those officials previously had removed the victim from the dangerous environment, and then deliberately resituated her in the same locus of danger. *Id.* at 505, 509. None of these circumstances was present in the record before the First Circuit. *Bailey*'s reasoning simply demonstrates that, when a principle by which facts are measured is drawn and consistently applied, distinguishable sets of circumstances will fall on either side of it.

Such consistent application of *Martinez* was underscored in a Fourth Circuit opinion to which petitioner cites. *Jensen* v. *Conrad*, 747 F.2d 185 (4th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 1754, 84 L.Ed.2d 818 (1985). There, the Court of Appeals first summarized the various circuit court decisions, and then suggested, in *dicta*, "*some* of the factors that should be included in a 'special relationship' analysis." *Id.* at 194 & n.11 (emphasis added). One of those factors, the presence of an affirmative statutory duty to protect the victim, was conspicuously absent from the record before the First Circuit in this case. *Petition* at A. 14 & n.14.[1] Indeed, in a case

[1] Another of the *Jensen* factors, "[w]hether the State knew of the claimants' plight," 747 F.2d at n.11, also is particularly relevant to the record before the

more analogous to the record before the First Circuit in this case, the Fourth Circuit Court of Appeals held that, absent any such statutory duty to protect, parole officials' failure to incarcerate a parolee did not deprive the parolee's victim of any constitutional right. *Fox* v. *Custis*, 712 F.2d 84 (4th Cir. 1983). Moreover, the factors outlined in *Jensen* are consistent with both the *Martinez* rationale and the scrutiny applied to the peculiar facts of this case by the First Circuit Court of Appeals. *Petition* A. 12-15. The First Circuit's holding that no "special relationship" had been established on the extensive record before it therefore is no more worthy of review by this Court than the similarly fact-bound decision in *Jensen*. 747 F.2d at 195.

Petitioner also relies on a district court decision, *Beck* v. *Kansas University Psychiatry Foundation*, 580 F.Supp. 527 (D. Kan. 1984), despite the fact that the *Beck* court erroneously relied on state tort law principles to ascertain the existence of a special relationship between the victims and the state defendants. 580 F.Supp. at 534. *Cf. Martinez* v. *California*, 444 U.S. at 285 (§ 1983 claims not properly analyzed under state tort law). *See also Daniels* v. *Williams*, 474 U.S. , 106 S.Ct. 662, 667, 88 L.Ed.2d 662, 669 (1986) (Fourteenth Amendment does not embrace state tort law concepts). Further, though the Tenth Circuit Court of Appeals had no opportunity to review the reasoning in *Beck*, it has made clear its understanding of the *Martinez* rationale, noting that "[t]he remoteness discussed in *Martinez* was not simply a matter of time," and affirming — on other facts demonstrating remoteness — the dismissal of a rape victim's § 1983 claim against parole officers. *Humann* v. *Wilson*, 696 F.2d 783, 784 (10th Cir. 1983).

First Circuit: none of the County defendants ever knew of Prendergast's furloughs, and two of them, Bens and Buckley, did not even know of any report of Prendergast's dangerousness to Patricia Gilmore. *Petition* at A. 6, 7.

Finally, the Seventh Circuit opinion to which petitioner and the First Circuit cite, *Petition* at 13, A. 10, 11, applied the *Martinez* rationale in the context of the state's allegedly reckless release of a murderous mental patient, noting that ". . . there is no constitutional right to be protected by the state against being murdered by criminals or madmen," and therefore holding that a state may not be liable under § 1983 unless it "puts a man in a position of danger from private persons and then fails to protect him . . .." *Bowers* v. *DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). Finding only a failure by the state to protect the appellant, but no affirmative *placement* of her in a position of danger, the *Bowers* panel affirmed dismissal of the complaint on a ground just as cogent to the First Circuit's affirmance here. *Petition* at A. 14, 15.

In sum, it is clear that the circuit courts are in harmony in their interpretation and application of *Martinez*, and that the legal principles pertinent to this case have developed in an orderly and consistent manner. Although specific facts, such as the existence of an express statutory duty, may lead to different results in different cases, that is not evidence of any inconsistency in the courts' legal analyses. In *Martinez*, this Court marked the distinction between common law tort liability and due process violations; no finer line need be drawn.

II. There Was No Error in the First Circuit's Thorough Analysis of the Facts Before It.

The First Circuit's analysis, like that in *Martinez*, revolved around the essential distinction between the conduct of a released prisoner and the action — or, more accurately, inaction — of the state which allowed that release to occur. *Petition* at A. 10, 11. As outlined in Part I, *supra*, circuit courts confronted by claims and circumstances analogous to those pre-

sented in *Martinez* consistently have applied its distinction between private conduct and state-sponsored deprivation, and, in light of the factual sensitivity underlined by *Martinez*, have made independent assessments of the "remoteness" between the state decision and the victim's deprivation. Mindful of this precedent, the First Circuit Court of Appeals conducted precisely the sort of factual inquiry urged in *Martinez*:

> It would seem from what we have just said that we should affirm without more. However, both the Supreme Court in *Martinez* and various circuit courts, including the Seventh Circuit, have indicated that in some special circumstances, where a state has assumed a 'special custodial or other relationship' in respect of a particular person, the state's failure to protect that person might implicate the due process clause. *Fox* v. *Custis*, 712 F.2d 84, 88 (4th Cir. 1983) (collecting cases). We must inquire, therefore, whether any such special circumstances exist here.

Petition at A. 11, 12.

That inquiry began with a threshold finding, prompted by the *Martinez* Court's counsel that, state tort law principles of duty and proximate cause notwithstanding, a violation of § 1983 could be proven only if the state defendants had " 'deprive[d]' appellants' decedent of life within the meaning of the Fourteenth Amendment." *Martinez*, 444 U.S. at 285. On that score, and with the full range of constitutional and statutory entitlements urged by petitioner before it, the First Circuit panel correctly held that the state's "fail[ure] to provide the victim protection . . . is not a violation of the due process clause . . .." *Petition* at A. 11 & n.10. Petitioner does not now directly challenge that finding, but seeks to divert this Court's

attention from it by citing to the broad, general provisions of the Preamble and three Articles of the Constitution of the Commonwealth of Massachusetts. *Petition* at A. 8-10. Nothing in that sweeping language, however, cures the flaw in petitioner's argument, recognized by the First Circuit when it observed, ". . . that the plaintiff has failed to cite any provisions of state law that either imposed a constitutionally cognizable duty on the defendants to protect Gilmore, or afforded her an entitlement to protection." *Id.* at A. 14 & n.14.

The First Circuit followed this survey of constitutional, statutory, and regulatory provisions with an equally complete investigation of the factual circumstances which alone might support a finding of agency, custody or other special relationship sufficient to elevate a madman's act to the level of state-sponsored deprivation of a constitutional right. *See, e.g., Bowers* v. *DeVito,* 686 F.2d 616, 618 (7th Cir. 1982). In so doing, the First Circuit's analysis did not depart from the principles developed in *Martinez* and its progeny, but inferred from those cases the full panoply of factors which might bear upon whether the County defendants' release of Prendergast was — or was not — too "remote" from Patricia Gilmore's death to support a finding of the state action necessary to prove a violation of § 1983.

First, relying upon a factor applied by the *Martinez* court and panels in the Third, Fourth and Seventh Circuits, the First Circuit sought to determine whether Prendergast's murder of Gilmore affirmatively had been prompted or encouraged by the County defendants in a manner which reasonably could have placed him in an *agency* relationship with the state. After its review of the extensive record, the Court concluded:

> Furthermore, even though Prendergast was legally in state custody while on furlough, Prendergast was in no sense an agent of the state. The state played no

> part in creating the threat that Prendergast posed to Gilmore, Prendergast's murderous design was independently conceived and executed, and the state neither condoned nor encouraged his behavior. *See Martinez*, 444 U.S. at 285, 100 S.Ct. at 559; *Estate of Bailey* v. *County of York*, 768 F.2d 503, 513 (3d Cir. 1985) (Adams, J., dissenting); *Beard* v. *O'Neal*, 728 F.2d at 899; *Fox* v. *Custis*, 712 F.2d at 87 n.2.

Petition at A. 14.

Next, the First Circuit sought to ascertain from the record whether Gilmore herself had been in a *custody* relationship with the state, such that her constitutional rights affirmatively were placed in jeopardy by the state's action, and found:

> Here, the state and county defendants did not have custody or control over Gilmore, nor did they condone, ratify or in any way instigate Gilmore's homicidal encounter. *See, e.g., Jackson* v. *City of Joliet*, 715 F.2d 1200, 1204-5 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720 (1984).

Petition at A. 15.

Finally, the First Circuit went on to consider any evidence in the record of some other sort of special relationship. In so doing, the Court considered the very factors implicitly made relevant by the inquiries undertaken in *Martinez* and in the circuit court cases cited by petitioner, *i.e.*, "any knowledge the state defendants had of the special danger that Prendergast posed to Gilmore or the temporal proximity between Prendergast's release on furlough and Gilmore's murder . . .." *Id.*

at A. 14. Here again, the panel analyzed the relevant facts squarely within the framework of the *Martinez* line, and concluded that, "irrespective" of certain facts regarding those two particular criteria, the circumstances *in toto* demonstrated ". . . no special relationship of constitutional dimension between Gilmore and the state . . .." *Id.* at A. 15. As such, the First Circuit's thorough examination of the voluminous record before it, and its decision based on *all* of those facts, presents no more genuine a basis for review than analogous circuit court decisions which considered similar factors and which this Court prudently has declined to review.[2]

In fact, this case is less worthy of review, since at least three substantively distinct grounds on which the First Circuit explicitly reserved comment, *Petition* at A-16, provide alternative bases on which this Court could affirm without reaching the question presented by petitioner.

First, even assuming arguendo that *Martinez* created a "right" to be protected by prison officials from the acts of a released prisoner, that purported right was not "clearly established" in December, 1979, and therefore the County defendants are entitled to qualified immunity in this case.[3] Second, as

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[2] *See e.g., Jackson* v. *City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (ordering dismissal of § 1983 claims against state officials despite allegation that police at scene of victims' accident knew victims were burning to death in wrecked car and recklessly failed to intervene); *Beard* v. *O'Neal*, 728 F.2d 894 (7th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 104, 83 L.Ed.2d 48 (1984) (affirming summary judgment of § 1983 claim against state officials despite proof that government informant who witnessed murder of victim knew of imminent threat to victim yet failed to intervene). These cases demonstrate, *inter alia*, that a state defendant's knowledge of a threat to a specific victim and the lapse of time between the defendant's failure to act and the deprivation of constitutional rights are but two of the many factors which pertain to the "remoteness" inquiry suggested in *Martinez*.

[3] *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Jensen*, 747 F.2d at 193-194 (affirming that state officials who failed to protect victims of fatal beatings in 1979 were entitled to qualified immunity because "an affirmative duty of protection under the fourteenth amendment did not emerge until after 1980").

the District Court originally concluded in granting summary judgment, the record here suggests neither a policy which caused Patricia Gilmore's death,[4] nor any deliberate indifference toward or reckless disregard for her constitutional rights,[5] particularly "in light of the uncontroverted evidence . . . that the furlough program had a success rate of over 99% prior to the Prendergast incident . . .." *Petition* at A. 26, 27 & n.9. Finally, even if petitioner could prove that Gilmore suffered a deprivation as the proximate result of state action, he could not proceed on his § 1983 claim in light of the adequate post-deprivation remedy offered by the Massachusetts Tort Claims Act, M.G.L. c. 258, pursuant to which petitioner, along with Ms. Gilmore's parents and siblings, already have commenced three separate actions in state court against the County of Middlesex and the Commonwealth of Massachusetts.[6]

These alternative grounds for the First Circuit's decision make review by this Court unwarranted.

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[4] *See Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976); *Fernandez* v. *Chardon*, 681 F.2d 42, 55-56 (1st Cir. 1982), *aff'd*, 462 U.S. 650 (1983).

[5] *See Pembaur* v. *City of Cincinnati*, 475 U.S. , 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *Oklahoma City* v. *Tuttle*, 471 U.S. , 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985); *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978).

[6] *See Parratt* v. *Taylor*, 451 U.S. 527 (1981), *overruled on other grounds*, *Daniels* v. *Williams*, 474 U.S. , 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

Conclusion.

For the above-stated reasons, the County defendants submit that there is no conflict between the circuit courts' application of the guiding principles of *Martinez*, no inconsistency between those applications and the First Circuit's comprehensive analysis of the record in this case, and therefore, no basis for compelling review by this Court. The *Petition for a Writ of Certiorari* should be denied.

Respectfully submitted,

R. ROBERT POPEO,*
THOMAS R. MURTAGH,
PETER A. BIAGETTI,
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.,
One Financial Center,
Boston, Massachusetts 02111.
(617) 542-6000

For Respondents Middlesex County and John L. Danehy

EDWARD E. KELLY,*
BARRON & STADFELD,
18 Tremont Street,
Boston, Massachusetts 02108.
(617) 723-9800

For Respondents S. Lester Ralph and Michael E. McLaughlin

JAMES F. MEEHAN,*
CYNTHIA J. COHEN,
MEEHAN, BOYLE & COHEN, P.C.,
85 Devonshire Street,
Boston, Massachusetts 02109.
(617) 523-8300

For Respondent John J. Buckley

LEE CARL BROMBERG,*
BENJAMIN J. NAITOVE,
BROMBERG, SUNSTEIN & MCGREGOR,
10 West Street,
Boston, Massachusetts 02111.
(617) 426-6464

For Respondent Ralph J. Bens

*Counsel of Record
Dated: July 31, 1986